Supreme Court, U. S.
FILED
MAY 13 1975

IN THE

Supreme Court of the United States

DOCKET NO. 74-1421

PAUL CASHEN and IRENE CASHEN,

Petitioners,

vs.

FRANK SPANN, ROBERT BICKLEY, CHARLES M. EGAN, JR., JOHN DUNNE, individually and as servant, agent or employee of CHARLES EGAN, JR., "JOHN DOE," being a fictitious name of the "Reliable Informer," NEW JERSEY BELL TELEPHONE COMPANY, ANTHONY DE BIASI, THE COUNTY OF MORRIS and the BOROUGH OF WHARTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Paul Cashen and Irene Cashen, respectfuily pray that a writ of certiorari issue to review the decision of the Supreme Court of New Jersey which modifiled and affirmed the decision of the Appellate Division of the Superior Court of New Jersey which latter court ordered the disclosure of the identify of an informer in this civil case.

CITATIONS TO OPINION BELOW

The opinion of the Superior Court, Appellate Division delivered by Lynch, J.A.D. is reported in 125 N.J. Super. 386 (App. Div. 1973).

The opinion of the Supreme Court of New Jersey is reported in 66 N.J. 541 (1975) and is attached hereto as Appendix B, *infra*.

JURISDICTION

The judgment of the Superior Court, Appellate Division was entered on November 2, 1973, The Judgment of the Supreme Court of New Jersey which modified and affirmed the judgment of the Appellate Division was entered on February 25, 1975. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257 (3) since the petitioner's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States are drawn in question.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether an informer is entitled to immunity from suit, based upon the privilege of nondisclosure granted to the Government, when the information given by the informer is demonstrably false, malicious, libelous and defamatory?

2. Whether nondisclosure of an informer in a civil case deprives the petitioners of their rights to due process of law under the Fourteenth Amendment of the United States Constitution?

3. Whether the privilege of nondisclosure of the identify of an informer is applicable in civil cases and if so, what standard is to be applied?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutory and constitutional provisions involved are New Jersey Statutes Annotated 2A:84A-28 and Evidence Rule 36 and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and New Jersey Constitution Article I, Paragraph 1, all of which are printed in Appendix A. *infra*.

STATEMENT OF FACTS

On June 19, 1970, detectives of the Morris County Prosecutor's Office and police of the Borough of Wharton, armed with a search warrant and seeking evidence of bookmaking and lottery, broke into the home of the plaintiffs. As we now know the raid was a bizarre mistake. Plaintiffs, a relatively elderly retired couple, were completely innocent of any wrongdoing, and utterly without connection with gambling or other illegal activity of any kind.

By an amended complaint, plaintiffs sued Prosecutor Egan, detectives Bickley, Spann, Dunne and DeBiasi, one "John Doe," being a fictitious name of a "reliable informer" (who allegedly gave information that plaintiff Paul Cashen was involved in gambling activities), the New Jersey Bell Telephone Company (Telephone Company), the County of Morris (County) and the Borough of Wharton (Borough). The amended complaint against the County, defendant officials and Telephone Company, charged false arrest and imprisonment, libel and slander, invasion of privacy and assault and battery. It also charged that the Telephone Company, through its employees, negligently and wantonly supplied false information to the Prosecutor's detectives with respect to telephone calls made to plaintiff, Paul Cashen.

The answers of defendant Prosecutor, detectives, and the County, among other things, set up the defenses of immunity and failure of plaintiffs to state a claim upon which relief may be granted. Those defendants moved for summary judgment in their favor under, as they stated, "the doctrine of judicial immunity and its application covering conduct in the realm of the public prosecutor." Defendant Telephone Company also moved for summary

judgment, claiming that it acted in the premises in compliance with subpoena and other lawful orders of the Prosecutor and hence was cloaked with the same immunity as the Prosecutor. The Company also claimed that provisions of the Communications Act of 1934, Sec. 605, amended, 47 U.S.C. Sec. 605 (1968), absolved it from liability. The trial court granted summary judgment in favor of all defendants. Plaintiffs appeal from said judgment except, no appeal has been taken from the summary judgment which had earlier been granted in favor of the Borough.

Plaintiffs also claim that the error of the trial court in granting summary judgment to defendants subsumed the court's further error in refusing to compel the defendants to disclose the identity of the co-called "reliable informer" referred to in the affidavit of defendant Bickley which was the basis upon which the search warrant was issued.

The basic reasoning of the trial judge in granting summary judgment in favor of defendant Prosecutor and detectives was that since, in his view, there was no showing of malice on their part or that they acted for "personal reasons of their own or distinct from their required duty," they were immune from suit. Since the County of Morris was sued on the theory that such officials were its agents, the County was likewise absolved.

As to defendant, Telephone Company, the court held there was no liability because it acted pursuant to subpoena and, under the decisions in *United States v. Covello*, 410 F.2d 536 (2d Cir. 1969) and *Nolan v. United States*, 423 F.2d 1031 (10th Cir. 1969), and 47 U.S.C.A., Sec. 605, the Company was not liable.

In ruling that plaintiffs were not entitled to disclosure of the identify of the "reliable informer," the trial court held that the policy considerations which dictate nondisclosure of such information in criminal cases, expounded in *State v. Burnett*, 42 N.J. 377 (1963), and other cases, are likewise controlling in this civil case and preclude such disclosure.

The affidavit upon which the issuance of the search warrant was based was sworn to by defendant Bickley. It read, so far as here pertinent, as follows:

> On Monday, June 15, 1970, Det. Spann checked with the N.J. Bell Telephone Company as to phone calls made from 335-6508 and 539-6548, and it was learned from the Telephone Company that numerous calls were made to the residence at Nine Crater Avenue in Wharton, N.J., telephone number 366-3115 and telephone number 328-5364, and also telephone number 743-1133 in Bloomfield, New Jersey. A further check with the N.J. Bell Telephone Company revealed that the telephone number 366-3115, is listed to one Paul Cashen, Nine Crater Avenue, Wharton, N.J.; telephone number 328-5634 is listed to the U.S. Government, Picatinny Arsenal, Dover, N.J. Building 94 QAD and in control of Paul Cashen; and telephone number 743-1133 is listed to one, Lamont Curran, 29 Washington Road, Bloomfield, N.J. Inv. Bickley called a person at Picatinny Arsenal who has given reliable information relative to gambling activities there and was advised by this informant that one, Paul Cashen, employed at Picatinny Arsenal, was accepting horse bets and number bets from fellow employees at the Arsenal, and that at least twice a day would call from one or two pay phones in Building 94 to someone with these bets. He also stated that he would keep notations in a small black notebook which he kept constantly on his person to record said bets.

> On Monday, June 15, 1970, further inquiry was made with the Telephone Company, and it was learned from this that numerous phone calls were made from the Raymond Dragos residence to Paul Cashen, to Bloomfield and numerous phone calls from John Peragallo's residence to Paul Cashen, to Bloomfield.

Telephone number 335-6508 was listed to Mrs. Virginia Peragallo, wife of John Peragallo, otherwise identified in the affidavit as being engaged in taking horse and number bets. Telephone number 539-6548 was listed to Raymond Dragos, also identified in Bickley's affidavit as engaging in taking of such bets. Concededly the information contained in Bickley's affidavit was false in the following respects: (1) no phone calls were ever made to Cashen's home by Peragallo or Dragos; (2) telephone number 328-5634 at Building 94 QAD at Picatinny Arsenal was not in control of Paul Cashen at the time involved. Cashen had worked at Picatinny Arsenal for 38 years but had retired on October 31, 1969 and had been at the Arsenal on only one day since then, in January 1970, as he drove through the Arsenal grounds to go fishing; (3) the information allegedly given to Bickley that (a) Cashen was accepting horse and number bets at Picatinny, and (b) at least twice a day called from one or two pay phones in Building 94 with bets, was false; (4) the information allegedly given by a representative of the Telephone Company that numerous phone calls were made to Cashen from the residences of Dragos and Peragallo was also false.

Detective Spann testified on deposition that on June 15, 1970 he called the Morristown office of the Telephone Company and was told that calls were being made to Cashen's home from those of bookmakers Peragallo and Dragos. Spann further testified that he normally dealt with a Mrs. Di Fiore at the Morristown Office, but that she was not working on June 15, 1970, and he did not know the identity of the telephone representative who gave him the information. On the other hand, Mrs. Di Fiore testified on deposition that she worked at the Boonton Office and not at Morristown, as Spann said. But she did testify that on June 15 and 16, 1970, she was called at the Boonton Office and advised Spann that there was no information relative to the investigation for that day. She specifically said she never gave the Prosecutor's office any information as to Cashen's telephone number. There was also testimony that calls from Dragos to Cashen would not be toll calls, and therefore would be no record of them. And Peragallo's phone would not be serviced by either the Morristown or Boonton office but by the Dover office. In fact, Mrs. De Fiore testified she was never asked to give any information relative to the Peragallo home.

HOW FEDERAL QUESTIONS ARE PRESENTED

Prior to trial, petitioners moved for the name of the reliable informer who supplied false information to Prosecutor's detectives from Morris County.

The Affidavit upon which the search warrant was issued contained false, malicious and defamatory statements about the petitioners which is the basis for this civil suit for both compensatory and punitive damages.

The trial court denied petitioner's request. On appeal to the Superior Court, Appellate Division, petitioner again urged the above contention. The Appellate Division in its decision held disclosure was necessary for a fair determination of the cause.

Petitioner for Certification to the Supreme Court of New Jersey was granted. The New Jersey Supreme Court held that informers, whether reliable or not, have immunity from civil suits based upon the privilege of nondisclosure granted to the Government. This is an extension of *Roviaro v. U. S.*, 353 U.S. 53 (1957) and has never been decided by the United States Supreme Court.

The petitioners contends that disclosure is necessary for a fair determination of a cause pursuant to *Roviaro*. And further, failure to supply the name of the informer violates the petitioner's right to a fair trial, confrontation of witnesses and right to cross examine under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and New Jersey Constitution, Article I Paragraph I.

The Supreme Court of New Jersey passed upon all of these questions in its opinion (Appendix B), *infra*, except the test in *Roviaro, i.e.* disclosure is necessary when it is essential to a fair determination of a cause. On this issue it remanded the matter to the trial court for further facts and set as its standard for disclosure the amount of damages suffered by the petitioners.

Federal questions are therefore, properly presented by virtue of petitioners' claim of contravention of their rights under the Fourth, Fifth, and Sixth Amendments as made applicable to the States by the Fourteenth Amendment to the United States Constitution specifically as set forth hereinabove.

REASONS FOR GRANTING THE WRIT

1. The rationale for refusing to disclose the name of the reliable informer is based upon *N.J.S.A.* 2A:84A-28 and *Evidence Rule* 36.

> A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to dis e a violation of a provision of the laws of this te or of the United States or a governmental div.on thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues. L.1960, c52, p.459. Sec. 28.

The New Jersey Supreme Court recognizes that the privilege is not unlimited and adopted the approach in *Roviaro v. U.S.*, 353 U.S. 53 (1957).

The question for this Court to decide is whether an informer is entitled to immunity from suit, based upon the privilege of nondisclosure granted to the Government, when the information given by the informer is demonstrably false, malicious, libelous and defamatory.

The policy behind the privilege is to preserve the citizen's anonymity so that it will encourage them to reveal information concerning criminal activity to the police and protect the flow of "*vital*" information.

Applying this policy to the present case it is apparent that no valid public purpose can be served by withholding the identity of the informer. The information, if given at all, was totally false. By continuing this informer's services the public interest would be defeated. Disclosure

would not stop the flow of *vital* information, the only information it would stop is malicious, untrue and slanderous gossip.

The decision of the New Jersey Supreme Court gives immunity not only to reliable informers, but also to informers who furnish false and libelous statements to the police under the guise of vital information to combat criminal activities.

In re Quarles & Butler, 158 U.S. 532 (1895) which touched upon this problem was decided long before *Roviaro* which rejects the theory that the privilege is absolute and adopts the fairness concept. New Jersey has also adopted the same concept in *State v. Oliver*, 50 N.J. 39 (1967).

This decision has extended the rationale in both *Roviaro* and *Oliver* by granting to informers (unreliable) immunity from civil suits based upon the privilege of nondisclosure to the Government.

2. The privilege relied upon is not the privilege of the informer but the privilege of the Government. The scope of the privilege is limited by its underlying purpose which is the furtherance and protection of the public interest in effective law enforcement. *Scher v. U.S.*, 305 U.S. 251 (1938); *State v. Burnett*, 42 N.J. 377 (1964).

Limitations or the privilege were set forth in *Roviaro v. U.S. supra*, at 59:

> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity or the contents of his communication is relevant and helpful to the defense of an accused, or is *essential to a fair determination of a cause*, the privilege must give way." (Emphasis added).

The same limitations as to "fairness" on the privilege is incorporated in *Rule of Evidence* 36, *N.J.S.A.* 2A:84A-28.

The New Jersey Supreme Court remanded the matter to the trial court with instructions that "it is proper for the court to give less weight to the interests of the plaintiff if it appears that he suffered only insubstantial damages." Certainly a fair determination of a cause is not dependent on the amount of damages suffered by a plaintiff.

The Court never decided or even took into consideration that failure to disclose the identity of the informer would deny the plaintiffs their right to sue, cross-examine or test the defense of the police officers who have raised the defense of probable cause to make the search and that they acted in good faith.

The test to be applied is as stated in *Roviaro* "is disclosure essential to a fair determination of a cause."

Failure to supply the name of the informer in the case at bar prevents the plaintiffs from:

(a) Bringing suit against one who gave false, malicious, defamatory and libelous statements against them;

(b) Cross-examining the police officers on matters directly in issue which is a matter of right.

(c) Testing the defenses of probable cause and good faith.

The information supplied by the informer in this case is not only relevant but is the crux of the whole matter, because if he in fact gave false information the detectives may be able to show that their acts were reasonable. However, if he did not give this information to the detectives then it would appear that the detectives filed a false affidavit.

3. The United States Supreme Court has never decided the issue of whether the privilege of nondisclosure of the identity of informers is applicable in civil cases, and if so, what standard is to be applied in civil actions.

There is a split of authority in the jurisdictions. Some impose a stricter standard in civil actions. *Black v. Sheraton Corporation of America,* 47, F.R.D. 263 (D.D.C. 1969); *Brocchicchio v. Curtis Publishing Company,* 203 F. Supp. 403, 407 (E.D. Pa. 1962).

Another line of cases recognizes no difference between civil and criminal actions and applies the rationale of *Roviaro,* see *e.g. Westinghouse Electric Corporation v. City of Burlington,* 122 U.S. App. D.C. 65, 351 F.2d 762 (C.A.D.C. 1965) on remand 246 F. Supp. 839 (D.D.C. 1965) *Drowin v. State,* 160 A.2d 85 (1960).

It is important to the administration of justice in both the State and Federal Courts that this Court resolve the conflict noted above and determine if the privilege is applicable to civil cases, and if so, what standard should apply.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ACCARDI & KOCH
Attorneys for Petitioners

By: /s/ Joseph S. Accardi
JOSEPH S. ACCARDI

Dated:

APPENDIX

Appendix A

Appendix A—Constitutional Provisions and Statutes Involved

New Jersey Constitution

ARTICLE I, PARAGRAPH I:

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

United States Constitution

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the Witnesses in his favor, and to have the Assistance of Counsel for defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW JERSEY STATUTE

2A:84A-28 Identity of Informer

Rule 36

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the

State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

NEW JERSEY RULES OF EVIDENCE

Rule 36. Identity of Informer

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

Appendix B

Opinion of the Court

Argued October 22, 1974—Decided Feb. 25, 1975.

On appeal from the Superior Court of New Jersey, Appellate Division, whose opinion is reported at 125 *N.J. Super.* 386 (App. Div. 1973).

Mr. Stephen S. Weinstein argued the cause for defendants-appellants and cross-respondents, Frank Spann, Robert Bickley and John Dunne (*Mr. Herbert M. Korn*, on the brief).

Mr. Joseph S. Accardi argued the cause for plaintiffs-respondents and cross-appellants, Paul Cashen and Irene Cashen (*Messrs. Accardi & Koch*, attorneys; *Mr. Accardi*, on the brief).

Mr. Richard W. Berg, Deputy Attorney General of New Jersey, argued the cause for intervenor-appellant, The State of New Jersey (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Berg*, of counsel and on the brief).

Mr. William T. McElroy argued the cause for defendants-respondents, Charles M. Egan, Jr., Anthony De Biasi, and County of Morris (*Messrs. McElroy, Connell, Foley & Geiser*, attorneys; (Mr. McElroy, of counsel; *Mr. Edward B. Deutsch*, on the brief).

Mr. Charles A. Sweeney argued the cause for defendant-respondent, New Jersey Bell Telephone Company.

The opinion of the Court was delivered by PASHMAN, J.

This is a civil action for damages arising out of an allegedly illegal search of plaintiffs' home. On June 19, 1970 detectives of the Morris County Prosecutor's Office and police officers from the Borough of Wharton executed a search warrant at plaintiffs' residence seeking evidence of gambling activity. The detectives allegedly relied upon information provided by a "reliable informer" in preparing the affidavit in support of the search warrant. The facts are set out in some detail below and need not be recited at length here. It suffices to note that it is now conceded that the affidavit was grossly erroneous in significant respects and that the search failed to reveal any evidence of gambling activity.

To recover for damages resulting from the preparation of the erroneous affidavit and the execution of the search warrant, plaintiffs instituted the present suit against the Prosecutor of Morris County, four detectives, New Jersey Bell Telephone Company, the County of Morris, the Borough of Wharton, and "John Doe," the "reliable informer," whose identity is unknown.

The trial court granted motions for summary judgment in favor of all defendants and denied plaintiffs' motion to compel answers to interrogatories which would have required the disclosure of the identity of the informer. In a well-reasoned and in-depth opinion by Judge Lynch, the Appellate Division affirmed the summary judgment for all of the defendants except three of the detectives, Bickley, Spann, and Dunne, and reversed the denial of plaintiffs' motion to compel discovery as to the identity of the informer. *Cashen v. Spann*, 125 *N.J. Super.* 386 (App. Div. 1973). We granted petitions for certification by the

detectives, and the State,[1] and the cross-petition submitted by plaintiffs. 65 *N.J.* 290 (1974).

With certain modifications discussed below, the judgment is affirmed substantially for the reasons expressed by the Appellate Division.

Relying on *Hann v. Lloyd*, 50 *N.J.L.* 1 (Sup. Ct. 1887), the Appellate Division's analysis of the immunity of the defendant prosecutor proceeded on the theory that the "prosecutor was cloaked with the same immunity as possessed by a judge." *Cashen, supra* at 395. We do not believe that this approach is supported by the law of this State, but in any event, we feel that there are compelling reasons for distinguishing the two forms of official immunity.

The unqualified immunity of judges is well established in New Jersey. As early as 1818, in *Little v. Moore,* 4 *N.J.L.* 84 (Sup. Ct. 1818), the court observed that it is a "universal position, which admits of no exception" that judges are immune from suit for mere errors of judgment in the discharge of their official duties. 4 *N.J.L.* at 85. Commenting on the need for recognizing this immunity, the court said:

> It is a principle which lies at the very foundation of a free, vigorous and independent administration of justice. It may be traced from the earliest periods of our judicial history down to the present day. * * * Indeed, were we to subject the judges of the established courts of justice to private prosecutions whenever the passions or resentments of disappointed suitors might dictate that measure, we should subdue their

1. On February 26, 1974 the Court granted the motion of the Attorney General on behalf of the State for leave to intervene.

> independence and destroy their authority. [4 *N.J.L.* at 85-86][2]

The principle which recognizes that judges must be free from the threat of civil suit in order to discharge their judicial functions with the independence required by the public interest has been consistently adhered to by the courts of this State in the years since *Little, supra; Mangold v. Thorpe,* 33 *N.J.L.* 134, 136-37 (Sup. Ct. 1868); *Loftus v. Fraz,* 43 *N.J.L.* 667, 669 (E. & A. 1881); *Grove v. Van Duyn,* 44 *N.J.L.* 654, 656-57 (E. & A. 1882). More recently, in *O'Regan v. Schermerhorn,* 25 *N.J. Misc.* 1, 50 *A.*2d 10 (Sup. Ct. 1946), a suit by a former prosecutor and his assistants against the members of a grand jury alleging libel, the court observed that the grand jury operates as an arm of the court. 25 *N.J. Misc.* at 19. With reference to judicial officers, the court said:

> It is settled by the great weight of authority, on considerations of public policy, that all officers exercising judicial functions are absolutely privileged in what they speak, write, or do in the performance of their judicial acts, at least where such statements are relevant and pertinent to the matter before them. Such acts are judicial acts and cannot form the basis for

2. *See also, Taylor v. Doremus,* 16 *N.J.L.* 473 (Sup. Ct. 1838), in which Hornblower, C.J., declared:

> That an action will not lie against a judge for *an error in judgment,* however prejudicial to the rights of the party such error may be, is a proposition so plain, so consonant to reason, and so essential to the very existence of courts of justice, that it needs neither authority nor argument to support it.
>
> *But* suppose the judgment to have been given *mala fides,* and under the influence of bribery and corruption, may not the injured party be permitted to aver such abuse of power, and to recover damages, if he can prove his averment! I answer no. Every argument that forbids an action for a mistake in judgment, applies with equal, nay, with increased force against such a proposition. No man would accept the office of a judge, if every disappointed and ill tempered litigant, might compel him to join issue, and submit himself to trial upon the question of his integrity. [16 N.J.L. at 475-76 (emphasis in original)].

> money damages, if the officer had jurisdiction of the parties and jurisdiction or color of jurisdiction of the subject-matter, even though in exercising such jurisdiction he acts erroneously, illegally, irregularly or in excess of jurisdiction, and such acts are alleged to have been done maliciously and corruptly. [25 N.J. Misc. at 20].

The United States Supreme Court has also had occasion to consider the concept of judicial immunity, and in the early case of *Bradley v. Fisher*, 80 *U.S.* (13 Wall) 335 (1872), the Court declared that it is a principle of "the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself." 80 *U.S.* (13 Wall) at 347. The Court also emphasized that the immunity afforded to judges was firmly established not only in the common law, but in other systems of jurisprudence as well:

> The principle, therefore, which exempts judges of courts of superior or general authority from liability in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.
>
> It has, as Chancellor Kent observes, "a deep root in the common law." [80 *U.S.* (13 Wall) at 347 (citation omitted)].

More recently, in *Pierson v. Ray*, 386 U.S. 547 (1967), the Court reiterated the historic nature of the privilege by observing that "[f]ew doctrines were

more solidly established at common law." 386 *U.S.* at 553-54. The Court, however, emphasized that the privilege is recognized not to protect the corrupt judge, but rather for the benefit of the public in whose interest it is that judges must be free to exercise the functions of their office without fear of the consequences. 386 *U.S.* at 554. *See also McCray v. Maryland*, 456 *F.*2d 1 (4 Cir. 1972).

Although it is clear that the public has a comparable interest in the independence of the prosecutorial function which warrants the extension to them of a limited form of immunity, we decline to characterize prosecutorial immunity as absolute or to equate it with its judicial counterpart. In so doing we are mindful that the courts of other jurisdictions have often compared the official immunity of prosecutors to that enjoyed by judges. *See, e.g., Yasselli v. Goff*, 12 *F.*2d 396, 404 (2 Cir. 1926), aff'd *per curiam*, 275 *U.S.* 503 (1927); *Bethea v. Reid*, 445 *F.*2d 1163, 1166 (3 Cir. 1971), *cert.* den. 404 *U.S.* 1061 (1972); *Bauers v. Heisely*, 361 F.2d 581, 589 (3 Cir. 1966), *cert.* den. 368 U.S. 1021 (1967); *Gabbard v. Rose*, 359 *F.*2d 182, 185 (6 Cir. 1966); *Kenney v. Fox*, 232 *F.*2d 288, 290 (6 Cir. 1956), *cert.* den. 356 *U.S.* 856 (1956); *Lundblade v. Doyle*, 379 *F. Supp.* 57, 60 (N.D. Ill. 1974). In our view, however, there are persuasive reasons for not equating the two forms of immunity.

We are also satisfied that the case law of this State is consistent with our conclusion that the two forms of immunity are not identical. Although the issue of prosecutorial immunity had occasionally been before the lower courts,[3] in *State v. Winne*, 12 *N.J.* 152 (1953), a criminal

3. In *Hann v. Lloyd*, 50 *N.J.L.* 1 (Sup. Ct. 1887), the plaintiff alleged assault, battery and false imprisonment on the part of a sheriff, a constable and a prosecutor of the pleas as a result of the execution of a writ of "compulsory process" to procure plaintiff's presence as a witness in a pending criminal

prosecution for nonfeasance in office, Chief Justice Vanderbilt indicated that the Supreme Court had not yet considered the problem :

> It is to be noted that in some jurisdictions a county prosecutor is not subject to a civil suit for damages at the hands of an aggrieved citizen, though that point has not been passed on here. [12 *N.J.* at 170 (citations omitted)].

Later that same year, this Court decided *Earl v. Winne*, 14 *N.J.* 119 (1935), an action against the Bergen County Prosecutor and two of his detectives. The complaint alleged false arrest and imprisonment, malicious prosecution, malicious abuse of process, and conspiracy arising out of plaintiff's arrest and indictment for criminal libel. The prosecutor defended on the grounds of, among other

trial. In concluding that a jury instruction to find in favor of defendants was proper, the court said:

> Mr. Addison in his work on Torts, section 922, thus states the doctrine of the law on this head: "Generally speaking, however, so long as the process has not been set aside it is a protection to the attorney who has issued it, and to the client by whose commands it has issued. And though when it has been set aside it is no longer a justification to them, yet it always remains a justification to the sheriff and his officers, who had no option but to obey it." Under the circumstances stated, the prosecutor of the pleas, with respect to what he did, was invested with an immunity similar to that which was possessed by the constable and the sheriff. [50 *N.J.L.* at 5].

See also Edelman v. Dunn, 107 *N.J.L.* 353 (E. & A. 1931) in which the court held that an action for unlawful detention and imprisonment could not be maintained even in the face of allegations that the assistant prosecutor acted maliciously in refusing to accept bail. The court did not base its conclusion on prosecutorial immunity but rather on the fact that a statute precluded prosecutors from exercising control over bail:

> We therefore conclude that the refusal by a public official to perform an official act for which there is no statutory authority, does not constitute a cause of action, even though his grounds for refusal were improper and he was actuated by a malicious motive, as the legality of an act cannot be changed or affected by the motive for which it is done. [107 *N.J.L.* at 354].

things, the lack of civil liability on the part of defendants as public officers. 14 *N.J.* at 123-24. In concluding that the prosecutor and his assistants do not enjoy unqualified immunity from civil suit, the Court said:

> The prosecutor of the pleas and his assistants are charged with the obligation to act in due accordance with the law in the discharge of their public duties, particularly by initiating such a proceeding by filing a complaint in a proper manner as established by the prevailing practice. The mere fact that their private rights have been invaded permits no deviation based upon personal predilection or gain. They have the benefit of the presumption that they act legally in the discharge of their public duty, but if the presumption is overcome by convincing proof that they acted in excess of and distinct from their required official duty for personal reasons of their own, then for such acts they are civilly liable. It is only such acts which are redressable in actions for malicious prosecution and malicious abuse of process. [14 *N.J.* at 134].

More recently, in *DeGroot v. Muccio*, 115 *N.J. Super.* 15 (Law Div. 1971), an action alleging wrongful participation in the murder prosecution of plaintiff on the part of, among others, the Passaic County Prosecutor, his assistants and a confidential aide. the trial court refused to dismiss all of the allegations against defendants based on the gravity of the charges. The gist of the complaint accused defendants of knowingly using perjured testimony on the part of two witnesses to implicate plaintiff and to "cover up" mistakes in their investigation. 115 *N.J. Super.* at 18.

Defendants moved for a dismissal of the complaint based on "the rule of judicial immunity and its application covering conduct in the realm of the public prosecution." 115 *N.J. Super.* at 20. After acknowledging that

no case from this Court had explored the problem of extending a judicial-type immunity to defendants, the trial court reviewed the authorities from other jurisdictions and found that "the persistence and durability of the defense is remarkable." 115 *N.J. Super.* at 23. The court, however, found the charges of subornation of perjury in the case before it to be not only "'serious,'" *"horrendous."* 115 *N.J. Super.* at 29 [emphasis in original]. In the court's view the enormity of the allegations made it unnecessary to hold that a prosecutor in New Jersey has a defense to civil suits, or to define the limits of prosecutorial immunity:

> [C]itation of authority is unnecessary for the proposition that conduct such as is alleged in transaction (1) is actionable in tort. No rationalization could possibly shield evil acts of such magnitude. [115 *N.J. Super.* at 29-30.

Thus it is clear that New Jersey case law to date has not equated prosecutorial immunity with its judicial counterpart and reflects the philosophy that there are indeed circumstances in which a prosecutor will incur civil liability for his official conduct. We wish to make it clear that we believe that this is the preferable approach to future problems involving the civil immunity of prosecutors in this State. The public interest is best served by recognizing that prosecutors enjoy only a limited form of immunity.[4]

4. Although this case involves a cause of action which accrued prior to July 1, 1972, it should be noted that the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 *et seq.* (Supp. 1974-75) also establishes limits on the immunity which it extends to public employees for injuries caused by the institution or prosecution of judicial or administrative proceedings. *N.J.S.A.* 59:3-8 (Supp. 1974-75) provides that:

> A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment.

(*Continued on Page 14a*)

For purposes of this case we need not consider the outer limits of prosecutorial immunity since we wholly agree with the conclusions of the Appellate Division that plaintiffs' allegations do not support any inference that the prosecutor in this case acted out of personal motive, with malicious intent, or in excess of his jurisdiction.

II

We also agree with the Appellate Division that in the context of this case, the prosecutor and the detectives are to be considered as agents of the State and not the county. *Cashen, supra* at 404-05. We wish to make it clear, however, that our resolution of this issue is limited to the factual circumstances here presented. We find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but we express no opinion on the question of whether the prosecutor or his detectives

(*Continued From Page 13a*)

The 1972 comment to the above provision makes it clear, however, that there are limits to the immunity granted by the section:

> This provision recognizes an immunity generally followed at common law. See DeGroot v. Muccio, 115 N.J. Super. 15, 277 A.2d 899 (Law Div. 1971); Grove v. Van Duyn, 44 N.J.L. 654, 43 A.R. 412 (E. & A.); Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, Inc., 31 N.J. 124 A.2d 536 (1959). It should be noted that the immunity does not extend to conduct amounting to a crime or constituting actual malice, actual fraud or willful misconduct.

Other sections also emphasize that the immunity granted by the act is not boundless. Section 59:3-14 provides:

> 59:3-14. *Public employee immunity—exception*
>
> a. Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.
>
> b. Nothing in this act shall exonerate a public employee from the full measure of recovery applicable to a person in the private sector if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

can be considered State or county employees for other purposes. *See Cooper v. Imbriani*, 63 N.J. 535 (1973). We also leave for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances.

III

Our primary area of disagreement with the Appellate Division, however, concerns the disclosure of the identity of the "John Doe" informer. The Appellate Division concluded that no valid public purpose was served by withholding the identity of the informer upon which the affidavit was based. *Cashen, supra* at 408.

The Appellate Division recognized that what is often termed the "informer's privilege" is in reality a privilege afforded the government in recognition of the compelling need of the State to protect its sources of information concerning criminal activity. The United States Supreme Court in *Roviaro v. United States*, 353 *U.S.* 53 (1957), observed that the privilege reflects the interest of society in effective law enforcement:

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. [353 *U.S.* at 59].

The privilege, however, is not unlimited, and in exploring its boundaries in *Roviaro, supra*, the Court observed that the scope of the privilege must be limited by the purposes it serves. One of the limits identified by the

Court is founded upon the "fundamental requirements of fairness." 353 *U.S.* at 60. The Court, however, declined to establish a fixed rule governing disclosure, recognizing that the problem required a balancing of the competing interests involved on a case by case basis:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. [353 *U.S.* at 62].

We adopted the *Roviaro* approach in *State v. Burnett*, 42 *N.J.* 377 (1964), and our rules of evidence reflect the limitations of fairness upon the privilege.[5] While we are sensitive to the fairness limitation on the scope of the privilege, it is important to emphasize that unwarranted disclosure of government informers poses a very real threat to the continued vitality of the principle. We recognized this danger in *State v. Oliver*, 50 *N.J.* 39 (1967):

> In dealing with the informer privilege, we must be mindful of the ease with which the privilege would

5. *Evid. R.* 36, *N.J.S.A.* 2A:84A-28 provides:

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

be destroyed if disclosure were required without a substantial showing of a need for it. [50 *N.J.* at 47].

Although the question is one of first impression in this State, it is now clear that the balancing process set forth in *Roviaro* is applicable to civil as well as criminal cases. *Westinghouse Electric Corp. v. Burlington*, 351 *F.*2d 762 (D.C. Cir. 1965):

> Appellee argues that the *Roviaro* standard would never justify disclosure in civil cases in which the Government is not a party. But the fact that the case is civil rather than criminal is not dispositive. * * * The policies behind the privilege and its exceptions extended to civil as well as criminal cases. Presumably most informers do not want their names to be revealed in either a civil or criminal proceeding. The fact that there would be a somewhat greater chance, statistically, of having their identity revealed if disclosure is required in civil cases would be unlikely to deter citizens from informing. There is no logical reason to set up two different privileges, one for civil and one for criminal cases. The defendant in a criminal case may have a greater stake than a party in a civil case, but that would not always be so: even admitting the probability of a greater risk of retaliation in a criminal case. The *Roviaro* balance should be struck in each case, civil and criminal, in deciding whether disclosure "is essential to a fair determination of a cause." [351 *F.*2d at 769 (quoting *Roviaro, supra*)].

See also Mitchell v. Roma, 265 *F.*2d 633 (3 Cir. 1959). *See generally* Annotation, "Application in Federal Civil Action, of Governmental Privilege of Nondisclosure of Identity of Informer," 8 *A.L.R. Fed.* 6 (1971) and cases cited therein.

In the present case, the Appellate Division struck the balance in favor of disclosure because in its view the information supplied by the informer was false; thus he could not be considered reliable. As a result, the court found that "[n]o public benefit would be served by continuing his 'informer' services." *Cashen, supra* at 408-09.

While we are satisfied that the Appellate Division correctly identified the balancing test to be applied in cases such as this one, we doubt that either the trial court or the Appellate Division had before it an adequate record to actually perform the delicate and difficult balancing of interests called for. Hence we vacate the order of the Appellate Division directing disclosure of the identity of the informant.

If, on remand, plaintiffs choose to press their motion to compel discovery and either the State or defendants,[6] by a suitable motion for a protective order pursuant to *R.* 4:10-3, resist discovery, the trial court will be required to consider all the facts bearing both on the possible unfairness to plaintiffs of denying disclosure of the identity of the informer and the possible harm which may be inflicted on State interests by disclosure. In evaluating the former, the court should consider, *inter alia*, the nature of the claims asserted by plaintiffs, the actual loss alleged, plaintiffs' reasons for seeking disclosure, and the likelihood that the evidence about or testimony by the informant will be necessary to plaintiffs' case. In evaluating the latter, the court should consider the risk of possible prej-

6. *Evid. R.* 36 gives the "witness," in this case defendants, the right to assert the privilege. Since, however, the privilege exists for the benefit of the State, the State may also assert the privilege on its own behalf. When the State has not been joined as a party defendant, it is appropriate to permit it to intervene for the limited purpose of seeking a protective order against disclosure of the identity of an informer. *Cf. O'Keefe v. Boeing Co.*, 38 *F.R.D.* 329 (S.D. N.Y. 1965).

udice to pending or future prosecutions as well as the danger that the informant may be exposed to physical harm, harassment, or other untoward consequences. It is proper for the court to give less weight to the interests of plaintiff if it appears that he has suffered only insubstantial damages. The risk of loss to plaintiffs resulting from the nondisclosure of the informant may be pure conjecture. *See Black v. Sheraton Corp. of America*, 47 *F.D.R.* 263 (D. D.C. 1969). We wish to emphasize that in civil cases in which disclosure is sought not to aid in the defense of criminal charges, but for the purpose of asserting claims for money damages, the interests of the State in maintaining the confidentiality of the informer's identity are entitled to a greater degree of respect.

The reliability of the informant or lack thereof, upon which the Appellate Division placed principal emphasis, may be relevant to the prejudice which the State will suffer by the disclosure of his identity and, thus, is a factor to be considered. Nevertheless, the mere fact that the informant has given erroneous information on one occasion is, of course, not necessarily dispositive of his over-all reliability as an informant (although it may have some bearing on the seriousness of the claim advanced by plaintiffs). As the Appellate Division properly observed, "not every misstatement or inaccuracy by an informer will necessarily result in the scales balancing towards a divulging of his identity." 125 *N.J. Super.* at 410. It should be noted that in this case, while it is agreed that the affidavit was erroneous, it has not yet been established that the information provided by the informant was erroneous.

While our discussion thus far recognizes the often vital law enforcement services which are performed by informers, it would be naive to suppose that the privilege of nondisclosure of confidential sources of information may

not be the source of potential abuse. In the context of the present case, one such possibility is the naked assertion by the State that no facts bearing on the interests of the government in maintaining the confidentiality of he informer can be disclosed because the facts themselves are confidential in nature. The motive for such an assertion in response to claims for damages for a mistaken search and seizure is obvious. Equally apparent is the difficult nature of plaintiff's task in proving his case if no facts bearing on the informer's activities, or existence, are disclosed.

In our view, basic considerations of fairness which ultimately circumscribe the informer's privilege, require that in civil cases, when disclosure of a confidential informer's identity is vital to a party's case, the respective interests must be balanced as contemplated by *Roviaro, supra, Burnett, supra,* and *Oliver, supra,* and a decision reached as to anonymity or disclosure. Such considerations may require that the identity of the informant be disclosed to a party in a civil suit under some circumstances. Nevertheless, this is a step to be taken with caution and only with full appreciation of all the consequences.

The judgment of the Appellate Division is affirmed as modified.